173

No. 10-281

In the Supreme Court of the United States

JEROME K. LANNING, ET AL.,
Petitioners,

v.

PATRICK PILCHER, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Florida First District Court of Appeal

RESPONDENT FLORIDA DEPARTMENT OF REVENUE'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does Florida's ad valorem taxation cap on annual increases to the assessed valuations of property used as a homestead unconstitutionally discriminate against owners of second or vacation residences, whose primary permanent home is outside of the State?

TABLE OF CONTENTS

Question Presented i

Table of Authorities iii

Opinion Below 1

Statement 1

Argument 6

Conclusion 16

TABLE OF AUTHORITIES

Cases

Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n,
545 U.S. 429 (2005) 9

Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.,
520 U.S. 564 (1997) 14

Citizens for Unif. Taxation v. Northport Pub. Sch. Dist.,
608 N.W.2d 480 (Mich. App. 2000) 12

Columbus-Muscogee Cnty. Consol. Gov't v. CM Tax Equalization, Inc.,
579 S.E.2d 200 (Ga. 2003) 12

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 9-10

Dep't of Revenue of Ky. v. Davis,
553 U.S. 328 (2008) 13, 14

Gen. Motors Corp. v. Tracy,
519 U.S. 278 (1997) 14

Homier Distrib. Co., Inc. v. City of Albany,
681 N.E.2d 390 (N.Y. 1997) 11, 13

In re CIG Field Servs. Co.,
112 P.3d 138 (Kan. 2005) 11, 13

Lanning v. Pilcher,
16 So. 3d 294 (Fla. Dist. Ct. App. 2009) 1

Lanning v. Pilcher,
37 So. 3d 847 (Fla. 2010) 1

Lennhausen v. Lake Shore Auto Parts Co.,
410 U.S. 356 (1973) 10

Markham v. Comstock,
708 N.Y.S.2d 674 (N.Y. App. Div. 2000) 12

McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.,
496 U.S. 18 (1990) 15

Nordlinger v. Hahn,
505 U.S. 1 (1992) ..... passim

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 13, 14

Reinish v. Clark,
765 So. 2d 197 (Fla. Dist. Ct. App. 2000) ..... passim

Reinish v. Clark,
790 So. 2d 1107 (Fla. 2001) 4, 7, 11

Reinish v. Clark,
534 U.S. 993 (2001) 4, 7, 11

Rubin v. Glaser,
416 A.2d 382 (N.J. 1980) 12

Rubin v. Glaser,
449 U.S. 977 (1980) 12

Stanek v. Kenai Peninsula Borough,
81 P.3d 268 (Alaska 2003) 12

Statutes and Constitutional Provisions

42 U.S.C. § 1983 3

42 U.S.C. § 1988 3

Fla. Const. art. VII, § 4(c) 1

Fla. Const. art. VII, § 4(d)(1) 1, 2

Fla. Const. art. VII, § 4(d)(8) 1

Fla. Const. art. VII, § 6 2

Fla. Stat. § 193.155 ..... 1, 2

Fla. Stat. § 194.171 15

Fla. Stat. § 196.012(18) 2

Fla. Stat. § 196.031 2

Other Authorities

Nat'l Conference of State Legislatures,
Property Tax Compendium, http://www.ncsl.org/
Portals/1/documents/educ/PROPERTYTAX
COMPENDIUMII.pdf 12

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Florida First District Court of Appeal, *Lanning v. Pilcher*, is reproduced in the Petitioner's Appendix ("Pet. App.") at App. 1 and is reported at 16 So. 3d 294 (Fla. Dist. Ct. App. 2009), *review denied*, 37 So. 3d 847 (Fla. 2010).

STATEMENT

This case involves a federal constitutional challenge to Florida's exemptions from ad valorem taxation for real property used as a Florida homestead. The particular challenge is to provisions of the Florida Constitution — commonly known as the "Save Our Homes" ("SOH") amendment — and its implementing statute[1] that create a tax cap on the amount that an assessment of the value of real property used as a homestead may increase each year. The tax benefit is based on the way the property is used — not on the status of the landowner as a resident or non-resident.

Petitioners are Alabama residents who own real property in Florida and use it as vacation or

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[1] The constitutional provisions are set forth in article VII, sections 4(d)(1) and (8) of the Florida Constitution, which was renumbered in 2008 from article VII, section 4(c). The implementing statute is section 193.155 of the Florida Statutes.

seasonal homes. Because of their property's use, it does not qualify for SOH benefits. The petitioners' homes are taxed in the same manner as vacation and seasonal homes owned by Florida residents. Petitioners claim their ineligibility for SOH is unconstitutional. The Florida trial and intermediate appellate courts rejected this contention; the Florida Supreme Court denied review.

The homestead exemption, which extends to owners of property used as a "permanent residence," exempts from taxation the first $25,000 of the property's assessment (later increased in 2008). Fla. Const. art. VII, § 6; Fla. Stat. § 196.031. "Permanent residence" is defined in Florida law as a person's "true, fixed, and permanent home." Fla. Stat. § 196.012(18). Under SOH, a person who receives the benefits of the homestead exemption is eligible for a three percent cap on the amount by which the yearly-assessed value of their homestead property may increase or the percentage change in the Consumer Price Index, whichever is less. Fla. Const. art. VII, § 4(d)(1). The tax benefit is assessed based on the use of the property as of January 1 each tax year. Fla. Stat. § 193.155. The use of the property is the only relevant consideration under SOH — the duration of the owner's Florida residency is not a factor or consideration for eligibility for the exemption. The exemption and the tax cap apply only to property that is used as a permanent residence and therefore qualifies as a Florida homestead. Non-homestead property, whether owned by a Florida resident or an out-of-state resident, is not eligible for the cap.

Petitioners own and make their permanent residences in Alabama and own vacation or seasonal properties in Florida. Pet. App. 67. They filed suit challenging the SOH assessment cap, asserting that it unconstitutionally discriminates against non-Florida residents. Pet. App. 60-61. Arguing that SOH violates the Commerce Clause and the Privileges and Immunities Clause, as well as petitioners' rights to travel, equal protection, and due process, petitioners sought a declaratory judgment, prospective relief, and supplemental retroactive relief by way of a refund of the alleged excess taxes they paid for the four years preceding their complaint. Pet. App. 90-110. Petitioners attempted to bring their action on behalf of a class of non-Florida resident, non-homestead property owners. Pet. App. 71. The complaint also included a 42 U.S.C. section 1983 claim and requested attorneys' fees under 42 U.S.C. section 1988.[2] Pet App. 110-111.

The trial court dismissed the constitutional claims with prejudice. Pet. App. 8-45. In analyzing the SOH provisions, the court noted, "it is the use of the residential property which controls its taxable status, not the owner or place of residence of the owner. All vacation, summer or second homes are assessed and taxed in the same manner and an owner's place of permanent residence is immaterial." Pet. App. 20. It held that the homeowners failed to state claims for relief as to the alleged constitutional violations, basing its decision in large part on the decisions in *Nordlinger v. Hahn*, 505 U.S. 1 (1992),

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[2] Petitioners abandoned the section 1983 claims on appeal.

and *Reinish v. Clark*, 765 So. 2d 197 (Fla. Dist. Ct. App. 2000), *review denied*, 790 So. 2d 1107 (Fla.), *cert. denied*, 534 U.S. 993 (2001). Pet. App. 18.

First, SOH does "not treat local persons and non-local persons who are similarly situated differently," and therefore does not violate the Commerce Clause. Pet. App. 19. Nor does SOH violate the Privileges and Immunities Clause, because the particular "owner or place of residence of the owner" does not control the taxable status of the property. Pet. App. 20. Rather, the taxable status of the property is controlled by the use of the property. As to the right to travel, the court held that the petitioners failed to identify "any obstacle preventing any of them from traveling to or from Florida, or any impediment to travel at all." Pet. App. 22. Because the SOH provisions apply in a non-discriminatory way and easily meet the rational basis test, the trial court dismissed the equal protection claim. Pet. App. 27. The court also noted that petitioners provided no legal authority in support of their due process claim. Pet. App. 29.

Florida's First District Court of Appeal agreed with the trial court's analysis on the constitutional claims. Pet. App. 7. It concluded that SOH does not make a distinction based on the residence of the property owner; "the tax benefit is based on the way the property is used, not on the status of the landowner as a resident or nonresident." Pet. App. 6. The court noted that "all of the issues in this case are controlled by well reasoned precedent," because the decisions in *Nordlinger* and *Reinish* rejected petitioners' same arguments. Pet. App. 4, 6.

A petition for discretionary review was filed in the Florida Supreme Court, which declined to accept jurisdiction. Pet. App. 46.

ARGUMENT

The issues presented do not warrant this Court's review. First, the relevant provisions of the Florida Constitution — commonly known as the "Save Our Homes" ("SOH") amendment — do not grant an impermissible tax benefit to residents of Florida. Rather, SOH treats all property owners the same, regardless of residence. Eligibility for SOH is based solely upon use of the property at issue; it is not based on the owner's status, nor the place of residence of the owner, nor the length of ownership. The Florida First District Court of Appeal therefore properly analyzed the constitutional claims, because each rests on the underlying assertion that SOH impermissibly discriminates against non-Florida residents. This determination is the crux of this case. Second, the decision below is entirely consistent with decisions of this Court and does not conflict with any decision of other state courts. No issue of nationwide importance exists, because the decision followed settled principles of constitutional law. For these reasons, the petition should be denied.

1. The essence of petitioners' arguments is that the Florida court erred by refusing to invalidate the SOH assessment cap. But the decision below was wholly based on prior precedent of this Court and on a case this Court refused to consider. Therefore, all of the petitioners' "arguments have been rejected before in comparable cases." Pet. App. 6. SOH is constitutional because "the tax benefit is based on the way the property is used, not on the status of the landowner as a resident or nonresident." Pet. App. 6.

The facts and legal claims in *Reinish v. Clark*, 765 So. 2d 197 (Fla. Dist. Ct. App. 2000), *review denied*, 790 So. 2d 1107 (Fla.), *cert. denied*, 534 U.S. 993 (2001), and this case are almost identical. In both cases, out-of-state residents who own non-homestead real property in Florida for seasonal or vacation use challenged the tax exemption as violative of the same constitutional provisions: equal protection, privileges and immunities, dormant commerce clause, and right to travel. Contrary to petitioners' assertion, Pet. 15, in *Reinish*, the homeowners challenged both the homestead exemption and the cap at issue here. 765 So. 2d at 213.

As in this case, the court in *Reinish* concluded that there was no basis for the constitutional claims raised by the out-of-state homeowners. First, the court there rejected the equal protection challenge. *Id.* at 206. Noting "the historic, civic, and economic significance of the need to foster and protect the primary residence of Florida homeowners, without an attendant need to give the same high level of protection to other types of residential properties," the court concluded that the exemption serves a "legitimate State purpose." *Id.* at 207.

The resolution of the equal protection issue below also is entirely consistent with this Court's decision in *Nordlinger v. Hahn*, 505 U.S. 1, 4 (1992), which addressed an equal protection challenge[3] to

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[3] The petition contains no argument that SOH violates equal protection. But the equal protection analysis by the court below and in *Reinish*, and by this Court in *Nordlinger* nevertheless (Continued...)

California's homestead taxation system that applied a ceiling on property tax rates and capped real property tax assessments (much like SOH). 505 U.S. at 4. This Court, in upholding the trial court's dismissal order in that case, applied a rational basis review and found that the State had at least two rational bases for the property tax amendment. *Id.* at 12. First, California had an interest in "local neighborhood preservation, continuity, and stability." *Id.* The State "legitimately can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses." *Id.* Second, an existing homeowner has "vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase" because the new owner can evaluate the tax ramifications prior to buying. *Id.* at 12-13. These same interests support SOH.

The court in *Reinish* also concluded that Florida's homestead exemption did not violate the Privileges and Immunities Clause. A State has a legitimate interest in drawing a distinction for purposes of taxation between the use of property for seasonal or vacation purposes and the use of property as a primary source of shelter. *Reinish*, 765 So. 2d at 208-10. The SOH provisions do not interfere with the right to travel, because non-residents are not precluded "from purchasing, enjoying, or disposing of Florida property" nor "does

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informs the analysis of the remainder of the constitutional claims that petitioners do assert.

[SOH] infringe upon the Clause's guarantee that individuals may migrate between States to live and work." *Id.* at 210 (citation and quotation marks omitted).

Moreover, duration of residency has absolutely no bearing on the homestead exemption or the assessment cap.[4] Two purchasers of identically-priced property in 2010 will receive the same exemption and assessment cap while they own the property, even if one is a forty-year Florida resident who has rented his or her entire life and the other moved to Florida just this year.

Under the "dormant" Commerce Clause, a State may not interfere with federal trade policy by burdening the flow of commerce across state borders. *See, e.g., Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005). The homestead exemption and SOH provisions do not violate the dormant Commerce Clause because they place no burden on out-of-state commerce. In *Reinish*, the Florida court's analysis focused on whether SOH discriminates against interstate commerce, which is the fourth factor in the four-part test set forth in *Complete Auto Transit, Inc. v. Brady*,

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[4] Petitioners assert that SOH draws a distinction between residents who have lived in Florida for more than six months and those who have resided in the State for less than six months. Pet. 25. They provide no citation for that assertion, for, indeed, no such distinction exists. Contrary to petitioners' claim, the SOH provisions do not require a six month or any other length of residency to become eligible for the homestead exemption.

430 U.S. 274 (1977). The court found no dormant Commerce Clause violation because the SOH provisions "do not treat local and interstate commerce differently." *Reinish*, 765 So. 2d at 214. It found "neither a discriminatory purpose underlying the exemption nor an improper discriminatory effect on non-residents." *Id.*

Here, petitioners make the same arguments rejected in *Reinish*, and likewise, cannot demonstrate any discrimination against interstate commerce. Taxation of real property in Florida is based on a property's use (e.g., homestead versus vacation or seasonal home). *Reinish*, 765 So. 2d at 214. A resident of another State who purchased residential property in Florida and then makes that property his or her permanent residence is entitled to claim the benefits of SOH for the purchased property whereas a Florida resident purchasing property as a second home is not. *Id.* at 214. No basis for discrimination against an out-of-state purchaser exists under this system.

The SOH provisions grant a narrow exemption designed to promote, as this Court has described it, "local neighborhood preservation, continuity, and stability." *Nordlinger*, 505 U.S. at 12. The distinction drawn is justified due to Florida's legitimate interest in protecting ownership of the primary source of shelter. The lines that are drawn by Florida's homestead system are consistent with States' broad authority to establish reasonable systems of taxation. *See Lennhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). Petitioners have failed to identify any constitutional claim that would

require this Court to second guess that judgment here.

Given that the SOH provisions are consistent with settled law from this Court and that Florida has acted within its recognized taxation authority, this case presents no question sufficiently important to trigger this Court's review. Petitioners' speculation that this statute has affected the housing market adversely is unfounded and unsupported by any evidence in the record or elsewhere. *See* Pet. 14 (SOH "likely contributed to the so-called 'bubble' in Florida real estate values").

The First District Court of Appeal's decision in *Reinish* was correct and review of that decision was not granted or warranted by either the Florida Supreme Court or this Court. *See Reinish*, 790 So. 2d 1107; 534 U.S. 993. Review similarly is unwarranted here. The cap on tax assessments draws a distinction only on a property's use, and the cap serves a legitimate and substantial state interest. The constitutional claims are therefore without a basis.

2. The decision below is not in tension with any decision of another state supreme court as to the meaning of "discrimination." The cases petitioners cited as conflicting did not deal with a homestead tax exemption. *See In re CIG Field Servs. Co.*, 112 P.3d 138, 146 (Kan. 2005) (classification of natural gas gathering systems resulted in higher taxes for interstate and intercounty systems than for intracounty systems); *Homier Distrib. Co., Inc. v. City of Albany*, 681 N.E.2d 390, 393 (N.Y. 1997) (transient retail business tax imposed). These cases

therefore did not deal with distinctions drawn for property tax purposes between permanent versus non-permanent residences. Indeed, as petitioners recognize, Pet. 30, state courts consistently hold that their respective States' homestead exemptions draw their eligibility lines on the constitutional basis of the use of property as a permanent residence rather than the status of the owner as a state resident. *Stanek v. Kenai Peninsula Borough*, 81 P.3d 268, 271 (Alaska 2003); *Reinish*, 765 So. 2d at 207; *Columbus-Muscogee Cnty. Consol. Gov't v. CM Tax Equalization, Inc.*, 579 S.E.2d 200, 204 (Ga. 2003); *Citizens for Unif. Taxation v. Northport Pub. Sch. Dist.*, 608 N.W.2d 480, 483 (Mich. App. 2000); *Rubin v. Glaser*, 416 A.2d 382, 386 (N.J.), *appeal dismissed*, 449 U.S. 977 (1980); *Markham v. Comstock*, 708 N.Y.S.2d 674, 675 (N.Y. App. Div. 2000).

Here, Florida and other States offering homestead exemptions[5] provide a narrowly-defined tax *benefit* to promote communities of stable and secure permanent residences. *Rubin*, 416 A.2d at 388. The SOH provisions, with the attendant State interest in promoting the previously identified goals of "local neighborhood preservation, continuity, and stability," *Nordlinger*, 505 U.S. at 12, are not in tension with the cases petitioners cite.

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[5] Nearly all States offer some version of a homestead exemption. *See* Nat'l Conference of State Legislatures, *Property Tax Compendium*, http://www.ncsl.org/Portals/1/documents/educ/ PROPERTYTAXCOMPENDIUMII.pdf (last visited Oct. 19, 2010).

In the cases cited by the petitioners, the courts first deemed the challenged statutes discriminatory and then found that their effect on some state residents along with non-residents did not save the discriminatory character of the statutes. *CIG Field Servs. Co.*, 112 P.3d at 149-51 (ordinance that facially preferred local commerce was not saved by fact that non-local, intrastate commerce would be affected along with interstate commerce); *Homier Distrib. Co.*, 681 N.E.2d at 394 (discriminatory character of a law is not altered because it also affects intrastate business). The dispositive fact in *Reinish*, this case, and all other state cases on point, by contrast, is that the homestead provisions are not discriminatory;[6] the differential treatment is based entirely on the *use* of the property, not the owners' residence. This distinction is made for significant state purposes, sanctioned by this Court in *Nordlinger* as "rational," "reasonable," "legitimate," and "deserving of protection." 505 U.S. at 12-13.

3. The decision below does not conflict with this Court's decisions in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), or *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008). Petitioners argue that a remand is necessary on their dormant Commerce Clause claim under *Pike*, so that an evidentiary hearing can be held to weigh the burdens

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[6] Indeed, the Florida courts are well aware that the "mere fact that the Florida homestead tax exemption disadvantages some Florida residents too does not necessarily immunize the provisions from constitutional review in a challenge by similarly disadvantaged non-residents." *Reinish*, 765 So. 2d at 209 n.7.

and benefits of the SOH provisions. But *Pike* only applies to regulatory cases and does not apply to tax cases. *See Pike*, 397 U.S. at 142 ("[w]here the statute *regulates* evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.") (emphasis added).

In attempting to extend *Pike*'s application to tax cases, petitioners quote a passage from *Davis*, 553 U.S. at 353, stating that the courtroom door is "generally" open to those invoking *Pike*'s undue burden test. Petitioners ignore a lengthier discussion in that opinion on the "open question" of whether *Pike* is "irrelevant" in tax cases. *Id.* A close reading of *Davis* strongly suggests that *Pike* does not apply to tax cases because courts are "professionally untrained" to make the kinds of factual determinations necessary in such situations. *Id.* at 355 (citation omitted).

The Court has limited *Pike*'s application to regulatory cases where it is better suited to balance the relevant interests. Indeed, prior to *Davis*, the Court had cited *Pike* in only two tax cases, *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997), and *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997). In neither case was *Pike* applied to produce the outcome because *Complete Auto* governed those tax cases.

4. The petitioners' final claim, that the court below would deny retroactive relief had it held in

their favor on the merits, is not an appropriate ground for certiorari. *See* Pet. App. 5 ("If the court were to find the provision and statutes unconstitutional, this would not entitle the plaintiffs to a reduction or refund."). The court's language regarding retroactive relief is dicta, making this case an improper vehicle for consideration of the issue petitioners assert.

Nor does the decision contravene the due process jurisprudence of this Court. Rather, the decision is fully compliant with the holding in *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 45 (1990) (recognizing a State's right to "enforce relatively short statutes of limitation applicable to actions" seeking recovery of unconstitutional taxes"). The petitioners do not dispute that they received requisite notice, or that such notice — along with the sixty-day window provided by section 194.171 of the Florida Statutes to properly challenge the homestead taxes assessed — is sufficient to confer all the process that is due. The petitioners simply forfeited their opportunity to challenge and seek a refund because of their failure to timely file a challenge.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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